Filed 11/27/17 P. v. Cachu CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. ANDREW CACHU, Defendant and Appellant.	B279334 (Los Angeles County Super. Ct. No. MA066123)

APPEAL from a judgment of the Superior Court of Los Angeles County, Kathleen Blanchard, Judge. Conditionally reversed and remanded with directions.

Mark Yanis, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Scott Taryle and Shawn Webb, Supervising Deputy Attorneys General, Carl Henry and Timothy L. O'Hair, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

A jury convicted defendant and appellant Andrew Cachu of first degree murder and second degree robbery. The allegation that defendant committed the offenses for the benefit of, at the direction of, or in association with a criminal street gang with the specific intent to promote, further, and assist in criminal conduct by gang members was found to be true as to both counts. The jury also found to be true all the firearm allegations related to the murder. The trial court sentenced defendant to 50 years to life in state prison.

Defendant was 17 years old when he committed the offenses. At that time, the District Attorney had the option to bypass juvenile court and directly file criminal charges in adult court. The District Attorney's office did so in this case.

Defendant contends we must remand the matter to juvenile court under the subsequently enacted Public Safety and Rehabilitation Act of 2016 (Proposition 57) for a judicial determination as to whether he should have been tried as an adult. He further asserts insufficient evidence supports the gang enhancement findings, the trial court erred in failing to instruct the jury it must find the prosecution proved each element of the substantive offenses and gang allegations beyond a reasonable doubt, and his case must be remanded to permit him to make a record of mitigating circumstance under *People v. Franklin* (2016) 63 Cal.4th 261 (*Franklin*). We asked the parties to submit supplemental letter briefs addressing whether the trial court erred in staying certain firearm enhancement terms under Penal

Code section 654[1] rather than under section 12022.53, subdivision (f).

We agree the matter must be remanded to the juvenile court pursuant to Proposition 57. Because we find no reversible error, however, our reversal is conditional, as explained below.

FACTUAL AND PROCEDURAL BACKGROUND

The facts surrounding the March 31, 2015 death of Louis Amela were not disputed. Defendant shot Amela in the back as the victim fought with several men after one of them attempted to steal his bicycle.

Amela rode his bicycle to Sky Burger on Palmdale Boulevard to meet his girlfriend, Nicole King. King identified Ernest Casique[2] as the individual who made a scene at the counter, walked out of the restaurant, and jumped onto Amela's bike. Amela ran after him and yanked Casique off the bicycle. A fight ensued, and two other males joined. Casique and one of the males grabbed and held Amela while the other fired two shots at him. One of the shots struck and killed Amela.

King ran to Amela. Casique was excitedly jumping around. He rode off on Amela's bicycle. The shooter went to the open door of a gray car and stood there. King remained focused on Amela;

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[1] All statutory citations are to the Penal Code unless otherwise indicated.

[2] King initially identified defendant in court as the person who caused the disturbance in the Sky Burger. Without expressly correcting that testimony, and as defendant notes in his opening brief, King's subsequent testimony established Casique, and not defendant, was the person who caused the disturbance. We set forth the evidence accordingly.

she did not see the shooter get into the car or see the car leave the scene.

Kaylee Fuentes, defendant's girlfriend, was the owner of the gray car. She also witnessed the crimes.[3] Fuentes believed defendant and a number of his friends, including two males she knew as "Silverio" and "Tony," were members of the D.A.F. gang.[4] Fuentes and defendant spent the afternoon of March 31, 2015, with Silverio and Tony. That evening, defendant drove them in Fuentes' car to Casique's house; Casique asked them to drive down Palmdale Boulevard to look for someone who had argued with his friends.

As they approached Sky Burger, Casique said, "He's right there, let me out." Defendant stopped in the next-door parking lot and the four males got out of the car. Defendant told Fuentes to drive over to Sky Burger.

Fuentes saw Casique on a bicycle fighting with another male. Fuentes heard two gunshots. The first struck one of the doors and went through the rear passenger window of her car. The second struck the male fighting with Casique.

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[3] Fuentes entered a plea to an accessory charge, for which she received a 180-day sentence in exchange for her truthful testimony.

[4] D.A.F. stood for "Down As Fuck." When defendant's friends visited Fuentes's house, they would make signs with their hands that caused Fuentes to believe they were members of D.A.F. Fuentes also saw Cachu "throw up" a gang sign—the letter "P." Cachu posted photographs of himself on social media displaying that letter under which he wrote "Palmas." Fuentes knew Palmas was another gang.

David Ferguson, a D.A.F. member and convicted felon, also testified for the prosecution. He overheard defendant boasting about killing someone from "DNE." Ferguson then went with defendant to Casique's house. Defendant recounted the crimes. At Casique's house, Ferguson cleaned up the glass debris in Fuentes's car and put a sticker over the bullet hole.

Shortly thereafter, defendant gave Ferguson a .38-caliber handgun in satisfaction of a $300 debt. Defendant told Ferguson the handgun was the murder weapon. Ferguson later sold the weapon to "Mousey from MTC."

Defendant participated in a lineup some six weeks after the shooting. Waiting in a holding cell with two undercover deputies who surreptitiously recorded their 45-minute conversation, defendant admitted the shooting. Portions of the conversation were played for the jury.

Defendant admitted he was with three other males and fired two shots at the victim, although one bullet stuck his "home girl's" car. Defendant also confirmed he sold the .38 caliber revolver and flushed the shell casings.

Detective Robert McGaughey testified as the prosecution's expert on the D.A.F. and Palmas 13 Kings (13 Kings) gangs. According to Detective McGaughey, there was no official alliance between the gangs, but a "core group" "affiliated together." The core group consisted of about three or four members of D.A.F., including defendant, Silverio, and Tony, and two or three members of 13 Kings, including Casique.

Responding to a hypothetical question based largely on the facts in this case, Detective McGaughey testified the robbery and murder were committed in association with and for the benefit of gang members from both D.A.F. and 13 Kings.

The detective described predicate offenses committed by two other D.A.F. gang members. Certified copies of minute orders documenting the convictions were received into evidence. Witness Ferguson admitted he was a member of D.A.F. and had been convicted of a predicate offense. But no one asked the detective whether any of the crimes listed in section 186.22, subdivision (e) were "primary activities" of D.A.F.

Detective McGaughey also described predicate offenses committed by two 13 Kings gang members other than Casique. Certified copies of minute orders documenting these convictions were received into evidence. The detective testified a primary activity of 13 Kings was felony vandalism.

DISCUSSION

I. Proposition 57

Defendant committed the robbery and murder on March 31, 2015, when he was 17 years old. As then permitted under the law, the district attorney filed criminal charges against him in adult court without first requesting a juvenile court "fitness" hearing. Defendant contends section 4 of Proposition 57, which repealed the "direct file" procedures, retroactively applies to him because his convictions were not final on the date of its passage, November 8, 2016. He seeks a remand to juvenile court for a Welfare and Institutions Code section 707 "transfer" hearing.

The retroactivity issue has generated robust discussion in the Court of Appeal, and the Supreme Court is slated to decide the retroactivity issue. (See, e.g., *People v. Superior Court* (*Walker*) (2017) 12 Cal.App.5th 687, review granted Sept. 13, 2017, S243072; *People v. Marquez* (2017) 11 Cal.App.5th 816, review granted July 26, 2017, S242660; *People v. Vela* (2017) 11

Cal.App.5th 68, review granted July 12, 2017, S242298; *People v. Mendoza* (2017) 10 Cal.App.5th 327, review granted July 12, 2017, S241647; *People v. Cervantes* (2017) 9 Cal.App.5th 569, review granted May 17, 2017, S241323; *People v. Superior Court* (*Lara*) (2017) 9 Cal.App.5th 753, review granted May 17, 2017, S241231.) In the meantime, a divided panel of this court has concluded that Proposition 57 "applies to every minor to whom it can constitutionally apply, which includes defendant because his conviction is not yet final." (*People v. Pineda* (2017) 14 Cal.App.5th 469, 478 (*Pineda*).)

As discussed below, we do not find defendant's other contentions persuasive. Accordingly, we conditionally reverse the judgment with directions to afford defendant the hearing required by Welfare and Institutions Code section 707, if requested by the prosecution. (See *Pineda, supra,* 14 Cal.App.5th at pp. 483-484.)

II. Sufficiency of the Evidence Supporting the Gang Enhancements

Defendant does not challenge the sufficiency of the evidence demonstrating that he was a member of D.A.F. and Casique was a member of 13 Kings. He does maintain, however, the prosecution failed to establish that "one of [the] primary activities" of either D.A.F. or 13 Kings was the commission of one or more of the predicate offenses in section 186.22, subdivision (e). (§ 186.22, subd. (f).)

Defendant is correct as to D.A.F. The prosecution presented evidence that two D.A.F. members had been convicted of predicate offenses (§ 186.22, subd. (e)), but Detective

McGaughey did not testify that these, or any other crimes, were the "primary activities" of D.A.F.

As for the primary activities of the 13 Kings, the detective testified as follows:

"[Prosecutor]: Can you tell us what the primary activities of Palmas 13 [Kings] gang?

"A: The primary activities is—*in my experience* has been graffiti, they're on graffiti, and fighting throughout the city along with assaults and firearms." (Italics added.) The detective later clarified the graffiti he referred to was felony vandalism.

Detective McGuaghey had previously testified he was an 11-year veteran of the Sheriff's Department and had been assigned to the gang unit for the previous seven years. He had been a detective in the gang unit since 2013. It was his opinion that members of D.A.F. "either individually or collectively [had] engaged in a pattern of criminal activity." He personally knew members of D.A.F. and 13 Kings, had investigated crimes involving both gangs, and had assisted in other investigations involving both gangs.

"'When considering a challenge to the sufficiency of the evidence to support a conviction, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citation.] We determine 'whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' In so doing, a reviewing court 'presumes in support of the judgment the existence of every

fact the trier could reasonably deduce from the evidence.'" (*People v. Edwards* (2013) 57 Cal.4th 658, 715.) "A reversal for insufficient evidence 'is unwarranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support'" the jury's verdict." (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.) The same standard applies to a claim that insufficient evidence supports a jury's gang allegation finding. (*People v. Villalobos* (2006) 145 Cal.App.4th 310, 321-322.)

"Sufficient proof of the gang's primary activities might consist of evidence that the group's members *consistently and repeatedly* have committed criminal activity listed in the gang statute. Also sufficient might be expert testimony, as occurred in [*People v.*] *Gardeley* [(1996)] 14 Cal.4th 605. There, a police gang expert testified that the gang of which defendant Gardeley had for nine years been a member was primarily engaged in the sale of narcotics and witness intimidation, both statutorily enumerated felonies. (See § 186.22, subd. (e)(4) & (8).) The gang expert based his opinion on conversations he had with Gardeley and fellow gang members, and on 'his personal investigations of hundreds of crimes committed by gang members,' together with information from colleagues in his own police department and other law enforcement agencies." (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 324.)

Detective McGaughey's testimony was sufficient. (*People v. Sengpadychith, supra,* 26 Cal.4th at p. 324; see also *In re Alexander L.* (2007) 149 Cal.App.4th 605, 613 ["the court knew where the information to which the expert was testifying originated and was able to assess its reliability"].)

III. Jury Instructions

Defendant contends the trial court erred when it instructed the jury with CALJIC Nos. 2.90 and 17.42.2, but did not expressly advise the jurors the prosecution must prove beyond a reasonable doubt each element of the murder and robbery charges and the gang allegations.[5] Defense counsel did not object to those instructions and did not request any clarifying or additional language.

As defendant acknowledges, however, *People v. Covarrubias* (2016) 1 Cal.5th 838, 911 (*Covarrubias*) is binding and dispositive at least as to the murder and robbery convictions; he is raising the issue "here to preserve review in federal courts." In *Covarrubias,* our Supreme Court held the defendant forfeited appellate review of the issue by failing to seek amplification or further clarification of the instruction. It then summarily disposed of the issue on the merits, noting it had previously rejected a similar claim in *People v. Thomas* (2011) 52 Cal.4th 336, 356 (*Thomas*). (*Covarrubias, supra,* 1 Cal.5th at p. 911.)

Covarrubias and *Thomas, supra,* 52 Cal.4th 336 concerned the "every element" argument in the context of substantive offenses, and *Thomas* also involved a special circumstance allegation. Defendant does not concede *Covarrubias* is

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[5] CALJIC No. 2.90 advised the prosecution had "the burden of proving [defendant] guilty beyond a reasonable doubt." The trial court also gave CALJIC No. 8.10 for the murder count and CALJIC No. 9.40 for robbery. In part, each instruction told the jury: "In order to prove this crime, each of the following elements must be proved:" followed by a list of the elements. CALJIC No. 17.42.2, the gang allegation instruction, told the jury, in part: "The People have the burden of proving the truth of this allegation. If you have a reasonable doubt that it is true, you must find it to be not true."

dispositive as to the gang enhancements, but he has not suggested that substantive offenses and gang allegations should be analyzed differently. Nor can we discern a rational reason to do so.

IV. *Franklin* Hearing

A person under 23 years of age who commits an offense carrying a sentence of 25 years to life is eligible for release on parole and entitled to a youth offender parole hearing during his or her 25th year of incarceration. (§ 3051, subd. (b)(3); *Franklin, supra,* 63 Cal.4th at pp. 276-277.) In order for the Board of Parole Hearings to provide "a meaningful opportunity [for the defendant] to obtain release" (§ 3051, subd. (e)), the Board is to "give great weight to the diminished culpability of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity." (§ 4801, subd. (c)).

As our Supreme Court has observed, assembling information about a juvenile offender's "characteristics and circumstances at the time of the offense . . . is typically a task more easily done at or near the time of the juvenile's offense rather than decades later when memories have faded, records may have been lost or destroyed, or family or community members may have relocated or passed away." (*Franklin, supra,* 63 Cal.4th at pp. 283-284.) Moreover, "section 3051, subdivision (f)(1) provides that any 'psychological evaluations and risk assessment instruments' used by the Board in assessing growth and maturity 'shall take into consideration . . . any subsequent growth and increased maturity of the individual.' Consideration of 'subsequent growth and increased maturity' implies the

availability of information about the offender when he was a juvenile." (*Franklin, supra,* 63 Cal.4th at p. 284.)

In *Franklin*, the defendant's sentence was affirmed, but the matter was remanded "to the Court of Appeal with instructions to remand to the trial court for the limited purpose of determining whether Franklin was afforded an adequate opportunity to make a record of information that will be relevant to the Board as it fulfills its statutory obligations under sections 3051 and 4801." (*Franklin, supra,* 63 Cal.4th at pp. 286-287.)

It is apparent from this record that defendant was afforded the requisite opportunity. Citing *Franklin* and section 3051, defense counsel stated he wanted "to make a record of my client's youth at the time of this incident and also of his lack of maturity." Defense counsel then presented statements from defendant's mother and aunt.

Defendant's mother apologized to Amela's family for their loss. She believed her son was "innocent at heart. He was—he was a youth. He was only 17 when this happened. [¶] And—but before that, he was a kid that was always just making jokes, laughing and always making us laugh, and even our little nephew, our cousin, they all love him because he was just always playing with them. He was playing with all these little kids. My little granddaughter too loved him because he is a child himself. And he is still a child. He is still a kid. Sorry. Thank you."

Defendant's aunt stated, "I just want to say that we are really sorry to the family. You know, but down in my heart I also feel that he is innocent. And he is—he is a lovely person, you know. Due to his immaturity, you know, his age and hanging out with the wrong crowd, not—not—not being mature about his actions. I just want [to] let you know that he is a lovely person.

He cares for me. I was handicapped and he cared for me and all my grandchildren. Lovely person. You know, I had him involved in church. He was—he was—he is—he has a good heart. He's—he's a good boy. [¶] I just want to thank you for giving me the chance to share this."

At the conclusion of these statements, the trial court inquired if defense counsel had any additional information to place on the record. He did not.

Defendant was provided with a *Franklin* hearing. As he notes, however, there was no evidence of "an investigation and . . . testing or psychological evaluations [or of] fleshing out specific instances that affected [defendant's] development and that lend some useful insight for the parole board to understand what led him to commit such an act." He argues the record will be inadequate when he is granted a youth offender parole hearing during his 25th year of incarceration and contends remand is necessary so information about defendant's character and the circumstances of the offenses may be placed on the record. Alternatively, he argues defense counsel's failure to make an adequate record constitutes ineffective assistance of counsel.

Defendant's reliance on *Franklin, supra,* 63 Cal.4th 261 for remand is unavailing. *Franklin* does not establish minimum requirements for the development or presentation of the evidence that might be relevant at eventual youth offender parole hearings. Having been given the opportunity that *Franklin* demands, remand for a new *Franklin* hearing is not compelled. (*People v. Cornejo* (2016) 3 Cal.App.5th 36, 68-70.)

Defendant's claim of ineffective assistance also fails: "When a claim of ineffective assistance is made on direct appeal, and the record does not show the reason for counsel's challenged

actions or omissions, the conviction must be affirmed unless there could be no satisfactory explanation. [Citation.]" (*People v. Anderson* (2001) 25 Cal.4th 543, 569.) "A claim of ineffective assistance in such a case is more appropriately decided in a habeas corpus proceeding." (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267.) The appellate record does not demonstrate why additional evidence was not presented, but one satisfactory explanation is that no additional mitigating evidence existed. There is no basis for reversal on this score.

V. Sentencing

The jury found true section 12022.53, subdivisions (b) and (c) allegations in connection with defendant's murder conviction. The trial court stayed the terms for those enhancements under section 654. Citing *People v. Palacios* (2007) 41 Cal.4th 720, 727-728, we asked the parties to submit supplemental letter briefs addressing whether the trial court erred in staying those terms under section 654 rather than under section 12022.53, subdivision (f). Only the Attorney General responded; and he agrees, as do we, the stay should have been under section 12022.53, subdivision (f).

DISPOSITION

The judgment is conditionally reversed. The cause is remanded to the juvenile court with directions to conduct a fitness hearing under Welfare and Institutions Code section 707, if the prosecution moves for such a hearing, no later than 90 days

from the date the remittitur issues. If, after a fitness hearing, the juvenile court determines it would have transferred defendant to a court of criminal jurisdiction, the judgment of conviction shall be reinstated as of the date of that determination, with the modification that the section 12022.53, subdivision (b) and (c) terms are stayed under section 12022.53, subdivision (f). If no motion for a fitness hearing is filed, or if a fitness hearing is held and the juvenile court determines it would not have transferred defendant to a court of criminal jurisdiction, defendant's criminal convictions, including the true findings on the alleged enhancements, will be deemed to be juvenile adjudications as of the date of the juvenile court's determination. In the event the convictions are deemed juvenile adjudications, the juvenile court shall then conduct a dispositional hearing and impose an appropriate disposition within the court's discretion.

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DUNNING, J.*

I concur:

BAKER, J.

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* Judge of the Orange Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

Kriegler, Acting P.J., concurring in part and dissenting in part

I concur in the judgment, except for the holding that defendant is entitled to a post-conviction fitness hearing under Proposition 57. (*People v. Pineda* (2017) 14 Cal.App.5th 469, 484–485 [conc. & dis. opn. of Kriegler, Acting P.J.].) There is nothing in the language of Proposition 57, or the documentation provided to the voters, to suggest the proposition applies retroactively to completed trials. The plain language of Proposition 57 requires a fitness hearing prior to the attachment of jeopardy. Here, not only has jeopardy attached, defendant has been convicted by jury of murder. A post-conviction fitness hearing is not authorized by Proposition 57.

KRIEGLER, Acting P.J.